Filed 4/13/10 P. v. Gonzalez CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALFONSO ARMANDO GONZALEZ, Defendant and Appellant.	B211833 (Los Angeles County Super. Ct. No. KA082730)

APPEAL from the judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Stephen D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant of attempted first degree murder and shooting at an occupied vehicle. Firearms and serious felony allegations were found true, and appellant was sentenced to life in prison, plus 20 years. He appeals his conviction, claiming the trial court erred instructing the jury and failed to hold a hearing as to his mental competence. These arguments are not persuasive. Therefore, we affirm.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

Appellant worked as a lathe operator for GNI Industries in Irwindale. Dionisio Galvan, appellant's supervisor, had a good working relationship with appellant and described him as a "good worker." Appellant was in a relationship with Lourdes Jimenez and the two had a daughter together.

In November 2003, almost a year after starting to work for GNI, appellant began telling Galvan to stop "meddling" with his family. Galvan told appellant he was mistaken. Later, appellant stared at Galvan and began harassing him, and even punched him in the face one day when Galvan left work to get lunch. Additional confrontations followed.

For example, in January 2004, Galvan was taking a break at work when appellant confronted him and pushed him against a machine. Appellant told Galvan he was meddling with his family and that they should "go outside" to fix the problem. Another employee had to get between appellant and Galvan. The police were called but Galvan told them he did not want appellant arrested. Appellant was fired and escorted off the premises.

In April 2004, Galvan arrived to work early and saw appellant parked outside sitting in his car. Appellant said, "I want you to go and get your belongings from

Aracely's house," and that, if he did not, appellant was "going to come back and fuck [him] up."[1]

The next month, appellant confronted Galvan in a liquor store and accused him of having an affair with his wife, indicating he saw Galvan coming out of his house. Appellant later went to the sidewalk in front of Galvan's home and stood there calling Galvan's name. Appellant also frequently drove by Galvan's house. Galvan finally got a restraining order. Even so, between January 2004 and April 2008, appellant drove by Galvan's residence six times. Appellant was also seen on two occasions sitting in his vehicle, about ten car lengths away from GNI.

In December 2007, Galvan went to a repair shop for work on his daughter's car. He saw appellant's parked car. Galvan ran into the shop when he saw appellant coming toward him. Appellant caught up with Galvan and started hitting him, causing bruising on Galvan's face.

Then, in April 2008, Galvan left work at GNI and started to drive home. He saw appellant parked in his vehicle next to another entrance to the building. Galvan was scared and entered a driveway so as to avoid appellant. Appellant blocked Galvan, who then put his car in reverse so as to return to GNI. Appellant followed and pulled alongside Galvan's car. Galvan saw the window to appellant's vehicle was open and appellant had his arm outstretched pointing a gun at him. Appellant was about five feet away.

Galvan ducked and heard the thump of a bullet and felt something on his leg. Galvan parked his car and found a bullet between the seat and his leg. The bullet had grazed his leg and torn his pants. He gave the bullet to police, who also found a cartridge case in the street where the shooting occurred and a bullet hole in the driver's side door of Galvan's vehicle. The cartridge case was found to have been fired from the semiautomatic handgun recovered from appellant's vehicle.

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[1] The record does not reveal the identity of the person called "Aracely."

When he was arrested, appellant told police he was angry and that Galvan was "ruining his life" because he was having a relationship with appellant's wife. Appellant explained that he once came home and saw Galvan dressed in women's clothing having sex with his wife. Appellant also said Galvan had convinced appellant's wife to give appellant a potion of some sort to make him crazy, which is what caused him to have the altercation with Galvan at work. When asked about the shooting, appellant became nervous, fidgety, and began to sweat and evade the question.

DISCUSSION

1. Jury Instruction on Corpus Delicti.

Appellant contends the trial court erred when it instructed the jury, pursuant to CALCRIM No. 359, that "the degree of the crime may be proved by the defendant's statement alone."[2] Appellant does not claim that the instruction was an incorrect statement of the law. Instead, he contends the instruction created an "unconstitutional permissive inference" because appellant's statements alone did not suffice to support an inference that the attempted murder was done willfully, with deliberation and premeditation.

We agree with respondent that this claim was forfeited by appellant's failure to object and request a modification of the standard instruction. A party may not complain for the first time on appeal that an instruction, which is otherwise an accurate statement of the law, required modification. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) Appellant concedes

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[2] CALCRIM No. 359 provides as follows: "Defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime or a lesser included offense was committed. [¶] The other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statement alone. [¶] You may not convict the defendant unless the People have proven his guilt beyond a reasonable doubt."

CALCRIM No. 359 is an accurate statement of the law. (See *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498 [concluding a substantially similar version of CALCRIM No. 359 is a correct statement of the corpus delicti rule].) Appellant is essentially arguing that the phrase, "the degree of the crime may be proved by the defendant's statement alone," should not have been included in the instruction, and thus that the instruction should have been modified. If appellant believed the instruction required modification, then he was obligated to object and request that the trial court change it. Because he failed to do so, the claim is forfeited.

Even assuming the claim is preserved for review, we reject appellant's contention because the court was obligated to give the instruction. The corpus delicti rule provides "that the corpus delicti or body of the crime cannot be proved exclusively by the defendant's extrajudicial statements. [Citations.] Because the defendant's extrajudicial admissions of guilt, in the absence of the corpus delicti rule, would otherwise qualify as substantial evidence to support a conviction [citation], the trial court is obligated to instruct the jury on the requirement of corroboration, which is a general principle of law 'vital to a proper consideration of the evidence.' [Citations.]" (*People v. Najera* (2008) 43 Cal.4th 1132, 1137.) The corpus delicti rule does not include the identity of the perpetrator or the degree of the crime, which may be shown by a defendant's statements alone and in the appropriate case the court should so instruct. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1183-1184 (*Alvarez*); *People v. Cooper* (1960) 53 Cal.2d 755, 765.)

Our Supreme Court has held that when the prosecutor relies on a defendant's extrajudicial statements, the trial court must instruct the jury on the requirement of independent proof of corpus delicti. (*Alvarez*, *supra*, 27 Cal.4th at pp. 1165, 1170, 1181.) Here, the prosecutor did rely on appellant's statements, as evidenced by the testimony of the detective who interviewed appellant after the shooting. Accordingly, the trial court properly instructed the jury with CALCRIM No. 359.

In addition, whether a legally correct instruction is misleading in a particular case is determined by reviewing the instruction as a whole. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) An instruction can only be found to be misleading if, in

the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*Ibid.*) We conclude the trial court properly instructed the jury. In light of the court's entire charge to the jury, and the ample evidence of each element of the crime (including appellant's stalking of Galvan, repeatedly driving by his home, and threatening to "fuck him up"), there is no reasonable likelihood that the jury misapplied the instruction in a way that deprived appellant of his constitutional rights.

2. Jury Instruction on Voluntary Manslaughter.

Appellant next contends the trial court erred by failing to sua sponte instruct the jury as to "heat of passion" attempted voluntary manslaughter based on appellant "seeing Galvan sleeping with [appellant's] wife." This contention lacks merit.

A trial court has a sua sponte duty to instruct a jury on a lesser included offense only if there is substantial evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. (*People v. Blair* (2005) 36 Cal.4th 686, 745.) Substantial evidence means "evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*Ibid.*)

"[T]he factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." ' [Citation.]" (*People v.*

Lee (1999) 20 Cal.4th 47, 59-60 [adequate provocation and heat of passion must be affirmatively demonstrated].)

There was no substantial evidence in this case showing appellant's reason was in fact obscured at the time he chose to follow Galvan in his vehicle, lift his arm, and fire his handgun out his window directly at Galvan. There is no substantial evidence in the record regarding appellant's state of mind at that time, including testimony describing appellant's conduct or demeanor in a fashion suggesting that on April 4, 2008 he was acting in the "heat of passion." Consequently, there was no substantial evidence from which a juror could conclude that at the time of the shooting appellant's reason was obscured or disturbed by passion to such an extent as would cause a reasonable person to act rashly and without deliberation and reflection. Only conjecture could support an inference that appellant acted in the heat of passion on the day of the shooting.

Appellant cites *People v. Berry* (1976) 18 Cal.3d 509 and *People v. Borchers* (1958) 50 Cal.2d 321 (*Borchers*) to support his claim that there was evidence of provocation in this case. We are unconvinced. In *Berry*, the defendant's detailed testimony was corroborated by a psychiatrist and showed that three days after he and the victim married, she left him. She returned several weeks later and announced she was in love with another man, had sex with him and now might be pregnant with his child. "Thus commenc[ing] a tormenting two weeks in which [the victim] alternately taunted defendant with her involvement with [the other man] and at the same time sexually excited defendant, indicating her desire to remain with him." (*Berry*, at p. 513.) There was no evidence of provocation even remotely similar in this case.

Likewise, in *Borchers*, the defendant fell in love with the victim and within two weeks they were engaged to be married. The victim had financial problems, and the defendant helped solve them, including paying her debts, giving her power of attorney over his assets, and buying a life insurance policy naming her as the beneficiary. The defendant also instructed his attorney to prepare papers to adopt her young illegitimate son. Later, the defendant hired a private investigator who informed him the victim was involved with criminals and willingly had sex with one of them, a pimp. She also gave

the pimp defendant's money. On the day of the killing, the defendant and victim went for a drive and she admitted her infidelity. She said she wished she were dead, attempted to jump from the car, took a gun from the glove compartment, repeatedly urged the defendant to shoot her, and taunted him by calling him chicken. (*Borchers, supra,* 50 Cal.2d at pp. 323-327.)

As respondent correctly points out, unlike the above cases there was no evidence appellant's wife had in fact been unfaithful to appellant. There also was no evidence even suggesting a reasonable basis for appellant to believe Galvan was having an affair with his wife. In short, there was no substantial evidence supporting the need for a "heat of passion" attempted murder jury instruction.

3. Mental Competency.

Lastly, appellant argues the trial court erred by failing to conduct a competency hearing under section 1368 in the face of evidence of his mental incompetency. We disagree.

Our Supreme Court recently articulated the legal principles regarding competency hearings in *People v. Lewis* (2008) 43 Cal.4th 415 (*Lewis*): " 'Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law prohibit the state from trying or convicting a criminal defendant while he or she is mentally incompetent. [Citations.] *A defendant is incompetent to stand trial if he or she lacks a " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—[or lacks] ... a rational as well as a factual understanding of the proceedings against him*.' " [Citations.]' [Citation.]"

" 'Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with *substantial evidence of incompetence,* that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. [Citations.] ... Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. [Citations.]' [Citation.] *But*

to be entitled to a competency hearing, 'a defendant must exhibit more than bizarre ... behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel. [Citations.]' [Citation.]"

" 'A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial. [Citations.] The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence, however, requires reversal of the judgment of conviction. [Citations.]' [Citation.]" (*Id.* at pp. 524-525, italics added; see also *People v. Deere* (1985) 41 Cal.3d 353, 358 [evidence that "merely raises a suspicion" that defendant lacks competence but does not disclose a present inability to participate rationally in trial is not deemed substantial requiring a competence hearing].)

In *Lewis*, the defendant made statements during the trial, in front of the jury and out of the jury's presence, suggesting he had been involved in an uncharged murder. During the testimony of a prosecution witness who testified regarding the defendant's involvement in several robbery offenses, the defendant said, " 'Bitch, you was at a murder too, fuck that. I got to go, bitch, you coming with me.' A few moments later, defendant exclaimed: 'This bitch guilty of murder. She is just as guilty of murder just like me, so it ain't no big deal.' After the jurors had left the courtroom, defendant stated: 'She is just as guilty as everybody else sitting right here right now. [¶] Fuck that right now.' When the court suggested a recess so counsel could speak with defendant, defendant interrupted: 'We don't need no recess. You can bring them in now. One more murder don't make no difference. You all can arrest this bitch right now.' When the court again suggested that counsel talk to his client and 'tell [him] at length that [his] outbursts may have an adverse effect on the jury,' defendant commented: 'Charge me to another crime. One more don't make no difference.' " (*Lewis, supra*, 43 Cal.4th at p. 523.)

Defendant's counsel in *Lewis* expressed his belief that his client was incompetent to stand trial. Counsel introduced a letter from a psychologist stating there was evidence

that defendant had suffered from brain damage, and asking that the defendant undergo neurological testing. The trial court denied the motion and declined to conduct a competency hearing. The Supreme Court held there was no error and that defendant's outbursts did not demonstrate incompetence. (*Lewis*, *supra*, 43 Cal.4th at pp. 525-526.)

Here, appellant contends the evidence was sufficient to require a competency hearing based upon (1) his revelation to the interviewing detective that Galvan was dressed in woman's clothing while having sex with his wife and that Galvan had convinced appellant's wife to give him a potion to make him crazy; and (2) a pre-plea probation report with a statement from Jimenez indicating a marital counselor had stated on some unspecified date that appellant "was not in his right mind." Although suggestive of delusional thinking, this evidence does not indicate defendant was unable to understand the proceedings or assist counsel with his defense. Certainly defendant's lawyer did not think so as he never raised the possibility that his client was incompetent; nor did anything occur during trial to suggest appellant was legally incompetent. Thus, the trial court did not err by failing to conduct a hearing.[3]

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J. FLIER, J.

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[3] Appellant has also filed a petition for writ of error coram vobis and/or habeas corpus asserting he was mentally incompetent to stand trial and the trial court should have conducted a competency hearing. (Case No. B220972.) We will rule on the petition by separate order.